IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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| VISHAL BHAMMER, | ) | |
| | ) | |
| Plaintiff | ) | |
| | ) | |
| -VS- | ) | CA No. 15-14213-FDS |
| | ) | Pages 1 - 38 |
| LOOMIS, SAYLES & COMPANY, L.P., | ) | |
| | ) | |
| Defendant | ) | |

**MOTION HEARING**

BEFORE THE HONORABLE F. DENNIS SAYLOR, IV
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 2
Boston, Massachusetts 02210
May 24, 2016, 2:01 p.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
1 Courthouse Way, Room 7200
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A P P E A R A N C E S:

PATRICK J. HANNON, ESQ. and BARBARA A. ROBB, ESQ., Shilepsky Hartley Robb Casey Michon, LLP, 11th Floor, 155 Seaport Boulevard, Boston, Massachusetts, 02210, appearing for the Plaintiff.

JAMES W. BUCKING, ESQ., Foley Hoag LLP, 155 Seaport Boulevard, Boston, Massachusetts, 02210-2600, appearing for the Defendant.

ROBERT A. FISHER, ESQ., Seyfarth Shaw LLP, Seaport East, Two Seaport Lane, Suite 300, Boston, Massachusetts, 02210, appearing for the Defendant.

P R O C E E D I N G S

THE CLERK: You may be seated. Court is now in session on the matter of Vishal Bhammer v. Loomis Sayles, Civil Action No. 15-14213. Will counsel please identify themselves for the record.

MR. HANNON: Good afternoon, your Honor. Patrick Hannon for the plaintiff. With me is Barbara Robb.

THE COURT: All right, good afternoon.

MR. BUCKING: Good afternoon, your Honor. James Bucking and Robert Fisher of Foley Hoag for the defendant.

THE COURT: All right, good afternoon.

All right, this is a hearing on defendant's motion to dismiss. Before we get there, I think, unless I'm missing something, I'm going to need a supplemental statement from the plaintiff. The defendant is a limited partnership, and the allegations in the complaint treat it as a corporation. Jurisdiction here is based on diversity, and so I need the citizenship of every member of the LP to insure that there is diversity. The plaintiff is, I think, a citizen of India who lived in Hong Kong, and I doubt that this is going to be an issue, but, still, why don't I give you let's say a week to get any supplemental statement on file indicating complete diversity?

MR. HANNON: Yes, your Honor.

THE COURT: And just as an aside, this is

something that is bedeviling me and the Federal Courts, in which LLCs and LPs and LLPs are treated as corporations, and so I have probably -- not picking on Mr. Hannon -- it's probably the 50th time I have had to do something like this. You know, the rules are what they are.

With that, let me hear from the defendant. Mr. Bucking, it's your motion.

MR. BUCKING: Yes, your Honor. Your Honor, I want to begin by just briefly describing what I think are the core allegations in the complaint to set the context for the argument. We're dealing with a plaintiff who is an experienced financial services professional, who at the time of his courtship by my client, Loomis Sayles, was working at Macquarie, which is a global financial services firm. The discussions involved a new hedge fund that was going to be launching in Asia in approximately 2015. Preparations for the launch began in 2014. Loomis hired somebody to run the fund, Michael McDonough, and hired an additional analyst by the name of Jeff Dorr, and the discussions with Mr. Bhammer began in January of 2015 and continued until June.

The key discussion that leads to the misrepresentation claim occurred in a Skype phone call in late January of 2015 between Mr. Bhammer and Mr. McDonough, who Loomis had hired to run the firm, and there are three claims, three statements from that call that I think are the

core statements that are at issue here: One is that Loomis represented in that call that the fund had an appropriate and well-defined process and strategy; two, that that process and strategy had been thoroughly reviewed; and, three, that the fund met Loomis's criterion for launching a new fund.

Now, there are a series of conversations that follow in February and March and April with other representatives of Loomis, and I submit to the Court, if you look at the specifics of those, they all relate back in some way to the original statements made by Mr. McDonough in that call to the extent that the company was committed to the fund, that it was progressing in accordance with the original discussion, that the company was proceeding slowly and carefully to insure a successful launch, and the company was making a long-term commitment to the fund. And so there are some additional generic statements that are alleged in the complaint, but really the ones that matter and the ones that plaintiff is relying upon occurred in the Skype call with Mr. McDonough.

I also think it's important to notice in the complaint a couple of other things, both for what they say and for what they don't say. The complaint alleges in Paragraphs 17 and 18 that shortly after the Skype call with McDonough, that McDonough provided a PowerPoint. Now, we

don't know anything about the PowerPoint, and it's not described in the complaint in any detail. We don't know what facts are contained in the PowerPoint, but we know that a PowerPoint was provided. The complaint alleges that Mr. Bhammer reviewed it and discussed it with McDonough.

We also know that on June 11 there was another PowerPoint. This is, again, referenced in the complaint. We also don't know anything about that PowerPoint. The allegations in the complaint are that the PowerPoints confirmed what McDonough and other representatives of Loomis told Mr. Bhammer.

We also know that in the June, 2015 time frame, certain logistical discussions are occurring about start date and where Mr. Bhammer will be working, and a training period, and timing of things like his move and his resignation from his current employer. And then on July 16, six months after the phone call between McDonough and Bhammer, Loomis tells Bhammer that it is abandoning the fund, and later said to him that that was based on a "recent assessment" of the fund's process and other details of the fund. So that's what we know from the complaint, so an initial call in January. Six months go by where essentially Loomis is telling Mr. Bhammer that things are progressing in accordance with the original discussion, and no details about any of the specifics but really simply

characterizations of the process, that Loomis had reviewed it, that it met its criterion, that it was progressing, things of that nature.

With that context, your Honor, let me suggest how we look at the complaint and how we submit that the Court should look at the complaint, all of which are grounded in the legal principles that we've extensively briefed. One is that we are not dealing with a sale of 20,000 soles of shoes. We're not dealing with roofing material that's manufactured according to specific standards. We're dealing with an inherently volatile endeavor. We're dealing with a brand-new hedge fund launching in Asia in the middle of what at best can be described, and we should all appreciate to be, an uncertain global financial market. A misrepresentation claim of this sort needs to be based upon facts that are verifiable, facts that you can objectively say, that's true or it's not true, not based upon characterizations.

THE COURT: Well, but the plaintiffs do cite these lines of cases that say under some circumstances, of course, limited circumstances, but even an opinion or a predictive statement or forward-looking statement could be actionable if it implies the existence of a fact, right? In other words, it can be context-driven. I mean, there has to be a factual statement underlying it, but even something on its face that looks like an opinion could be actionable as

misrepresenting a fact, I guess is the point.

MR. BUCKING: Right, your Honor, I think that that comes out of certain cases which really are not applicable here; and I think if you look at the specific cases, the court really found that they weren't in essence predictions but really were facts. So, to me, it's not a question of legal doctrine -- I agree that that doctrine exists -- but I think the application of it came up in the *Cummings* case, for example, with the roofing material, so that a manufacturer of a new type of plastic roofing material which the manufacturer represented to the commercial purchaser were designed to last 20 years, and the manufacturer in that case said, "Well, that's just a prediction" or "That's just an opinion," and the court said: Well, not really. It's really a question of marketability, and there are certain understood facts that are implied in that statement. That's just not a guess that it's going to last 20 years. What that really means, what that would be commonly understood to mean by a company that was going to put this material on its commercial buildings is that it was manufactured with materials and in a way that has been tested and designed and proven to typically last 20 years. And so in that case, your Honor states the principle correctly, and the court was able to articulate what those implied facts were, or the plaintiff was. Here, I don't think the plaintiff has been

able to articulate any facts that underlie the claim.

The other point, your Honor, is that in that kind of situation, the one with the roof, the conclusory statement at issue is what you'd expect to be said in that situation, and the facts are not ones that a reasonable commercial purchaser would ask. The commercial purchaser is not going to say, "Give me the detailed chemical composition of the material," because the purchaser wouldn't know what to do with that information, or, "Give me the lab results so I, as Cummings Property, can analyze whether the roof is going to last 20 years." There's no way the purchaser would know.

In this case, when Loomis says, "We have thoroughly reviewed the investment process, and it meets our criterion and is appropriate strategy," and then the next day Loomis gives Mr. Bhammer a PowerPoint which gets into further details, and Mr. Bhammer who's an experienced professional can ask himself what those details are. He's in the business too. He knows how to ask exactly those questions. And in our brief, your Honor, we suggest certain things that the company might have said that could have theoretically been misrepresentations or things that Mr. Bhammer could ask: "Do you have seed money? If so, how much? Have you signed a lease? If so, for how long? Can you get out of the lease? You hired Mr. McDonough and

Mr. Dorr in 2014. That seems to be pretty good evidence that you're committed to the fund. But maybe they don't really work for you after all, or maybe are you hiring other people?" There's lots of actual facts that we don't find anywhere in the complaint that either happened, but Mr. Bhammer is choosing not to tell us about them in the complaint, or didn't. But in either event, your Honor, what we have is a complaint that has extremely generic conclusory statements, mostly adjectives and adverbs. If you took the adjectives and adverbs out, you'd have nothing, and that can't be the case. You can't have a statement where if you remove the adjectives and adverbs, you wouldn't even have a representation at all, and that's really what we have here. If you take out words like "thoroughly" and "committed" and all that stuff, you don't have anything. You just have statements of optimism.

And, your Honor, again, it's important to understand the context in which this arises, especially in a state like Massachusetts which relies on an innovative economy. These kinds of comments are happening every single day to investors and every single day to employees. It can't be the law of the Commonwealth that expressing optimism about a fund and saying you're committed to a fund is a misrepresentation. There's simply not facts.

But the other piece, your Honor, which is equally

important is, there has to be an allegation that the facts that were stated were false. And we spend a lot of -- there's a lot of ink in the briefs about this, your Honor, but I want to succinctly summarize it this way: Take, for example, the allegation that Loomis had thoroughly reviewed the investment process. Okay, nowhere in the complaint does Mr. Bhammer allege that that's not true, okay. That's the primary allegation that they say is a fact. And I suppose that you might think in certain circumstances that it would be. So, for example, if you want to take the logic of the roofing case to the extreme, you could say, well, "thoroughly reviewed" means 100 hours a month, two months, whatever. You can make up something that Mr. Bhammer would claim means that that means it was thoroughly reviewed as opposed to some other kind of review.

You could also read the complaint to say: Well, of course they did that. They hired Mr. McDonough in 2014. He talked to Mr. Bhammer for six months in 2015 before they decided to abandon the fund. I don't know what Mr. McDonough and Mr. Dorr were doing if they weren't doing the kinds of things that would be consistent with that commitment, but, in any event, nowhere does he say, "You were lying to me. Mr. McDonough, even though he said that he was full time in the Angleton Fund, really wasn't. He really was launching yet another fund and really didn't review it at all, let

alone thoroughly." There's nothing like that anywhere in the complaint.

I would challenge Mr. Hannon to tell us one specific instance where there's an allegation of something that could even remotely be considered a fact, and then show us where in the complaint you say that fact is alleged not to be true, because all we have is a conclusion at the end that says, "Well, it turns out that you abandoned the fund in July, and so it turns out that you weren't committed in the long run because you abandoned the fund." But those are summaries, which presents its own problem, but forget that they're summaries; they don't correspond to the factual allegation.

So, for example, if the allegation was, "Mr. Bhammer, we have $100 million in seed money," right, an allegation that would suffice would say, "No, we didn't have $100 million. We had zero," or, "We had $25 million," or, "There was a material condition on the seed money that we didn't tell you about, and it turns out that condition wasn't satisfied," or, "We had $100 million when we told you in January, but then that was rescinded in March, and we didn't tell you that till July." That is, a situation where there was a misleading disclosure based upon subsequent events and arguably duty to disclose. We don't have any of those things because, number one, we don't have any fact

that would be susceptible to those things, but, number two, we simply don't have an allegation in the complaint anywhere where a specific fact that is alleged to be a misrepresentation corresponds with an allegation that says that that specific fact is not true. And, your Honor, if we don't have that, I don't know what we do have. I don't know what this trial would look like. The essence of the claim is that at some point Loomis realized that it was going to abandon the fund and it didn't tell him soon enough. That's really the allegation.

Now, there's no allegation what that means, right, because they don't say when we decided to abandon the fund relative to when we told Mr. Bhammer. For all we know, it could have been 30 seconds later. It could have been the company decided to abandon the fund, and the very first thing it did is got on the phone and said to Mr. Bhammer, "Don't get on the plane. We just decided to abandon the fund."

And if it's not that, your Honor, then the question is, tell me what this trial looks like. "Mr. McDonough, when did you first have the slightest doubt, based upon the volatility of the Chinese currency, that maybe you weren't going to launch this fund?

"Well, I don't know. I had a dream one night where I was nervous about it in April."

And, you know, I can't imagine what that is because ultimately, your Honor, you're not asking about facts that you can prove to be false. You're talking about states of mind and an evolving situation. This isn't: These soles have been stored in a warehouse where they degraded over the course of ten years, and now they don't work in the shoes that they're being sold for. This roof is supposed to last 20 years, and it cracked after 11 years because it wasn't manufactured in the way you claimed. These are ultimately impossible things to know, your Honor.

THE COURT: This is not really a 12(b)(6) issue, or I don't think it is, but you would agree, would you not, that because the defendant is this entity, a limited partnership, that it's responsible for the knowledge and statements of all of its agents? So that if it were to turn out that, for example, the people back in Boston were thinking about or serious about shutting this thing down 14 days before they told Bhammer, and Bhammer, you know, the irrevocable date or whatever it is where he can't go back to his old job passes and they don't tell him that that's attributable -- in other words, both McDonough's statements and whoever is making this decision in Boston statements are both the statements of Loomis Sayles; in other words, that the entity, the corporate entity, the business entity is responsible for all of those statements, all of those -- in

other words, even if the left hand doesn't know what the right hand is doing, that doesn't get the company off the hook, right? In other words, suppose there were a piece of paper -- I'll make it simple -- 30 days before Bhammer is told that says, "Let's shut this thing down," and nobody ever got around to telling anyone in the field, right, that would be, at least conceivably, under some circumstances actionable because you know this fact that it's about to be shut down, and yet you are representing to Bhammer that it's still alive and that he should take detrimentally reliant steps.

MR. BUCKING: Your Honor, I think the answer to your question is "yes," we're not claiming in this case that, or at least for the purposes of this motion, that something that McDonough said or Russell said or Marber said or Dorr said, all the people who are named in the complaint as having said various things, we're not claiming in any way that they are not representatives of Loomis for these purposes. I mean, that is the claim of misrepresentation. And I agree with you that if there were a duty to disclose, then the fact that some part of the company knew and McDonough, for example, didn't know, we're not claiming that in this case.

But to me, your Honor, the thing that your example highlights is what doesn't appear in the complaint: this

notion that we knew 30 days in advance, we had made a decision 30 days in advance and decided not to tell him.

THE COURT: Is it a plausible allegation that the decision was not made overnight and that it was under way two days or eleven days or three weeks before Bhammer was told? Would that be a reasonable inference?

MR. BUCKING: No. Your Honor, I think what that -- I want to separate out two things because this goes to Count 2 really more than Count 2.

THE COURT: Which is Count 2? I'm sorry.

MR. BUCKING: Count 2 is --

THE COURT: Is that intentional interference?

MR. BUCKING: Tortious nondisclosure.

THE COURT: Tortious nondisclosure.

MR. BUCKING: Right. So I don't think any of that saves Count 1. But in Count 2, the question would be, is there some fact that we have a duty to disclose that we didn't disclose, okay? And so in the scenario you gave, the company makes a decision to abandon the fund and decides to sit on it for 30 days. To the extent that the company previously told him it intended to launch the fund, at the point at which it had decided not to launch the fund, there's arguably a duty to disclose that because not doing so would contradict something that had occurred previously.

I think you asked a slightly different question, I

assume intentionally, which is, is there a duty to disclose the nanosecond that anyone in the entire company begins to have less confidence than he or she had previously? And the answer to that has to be "no." Just even asking the question seems absurd. How does that trial proceed?

THE COURT: I guess, but surely there's something about this that's troublesome -- of course, I just have the complaint -- I don't really know what happened here -- that if there's a serious issue that, you know, maybe this thing is not going to get off the ground, and meanwhile this guy in Hong Kong with a young family, whose residency in Hong Kong depends on him holding a job, is being hung out to dry, and would they have a duty, for example, to say, "Hold on a second. Don't resign your job just yet, you know, till you hear from us," you know, if they knew that this thing was seriously being considered or they were seriously considering shutting it down?

MR. BUCKING: Your Honor, that's a very interesting question. There's nothing in the complaint that makes us have to answer that question because there's no allegation that we did in fact know something sooner that we didn't tell him. He's just assuming that, "Gee, you must have. It's not possible that you could have told me as soon as you found out," when in fact of course it's possible that we told him as soon as we found out.

But, your Honor, I think that here's the other thing you don't see in the complaint: You don't see a breach of contract claim. And so we can sit here and speculate about what we might see if we saw a breach of contract claim. Maybe he has an employment agreement. Maybe he had an offer letter that spelled out what happens in the event that the discussion falls apart. A sophisticated prospective employee can be expected to negotiate a signing bonus, severance agreement, employment agreement, any number of things to protect against this; and this Court has no way of knowing what, if anything, Mr. Bhammer negotiated for, or what he asked for and Loomis said "no" to, because Loomis might have said, "It's a volatile fund. We're pretty confident about it, but we're not going to commit financially till it's launched." We don't know any of those things.

And so ultimately, your Honor, it is a troubling situation. It's troubling for Loomis. We said this in our papers and it's true: It's an unfortunate situation. And Mr. Bhammer and others were, you know, were on the wrong side of that, which unfortunately happens with a lot of nascent funds and other nascent businesses.

I don't think that that -- the fact that a breach of contract action may not be the most advantageous way for the plaintiff to plead this case does not make a

misrepresentation out of something that's not a misrepresentation, and ultimately what we have to do is look at what the claims are of misrepresentation: Are they facts that are susceptible to being proven true or not true? Because that's ultimately what happens at trial. Is there a factual statement that turned out not to be true or that wasn't true at the time? And you ought to be able to look at those things and decide. And I can't see how you could look at any of the specific claims in this case and say, yes, we can decide when McDonough said "We're committed to the fund" or "We're taking it slowly and cautiously" or "We've thoroughly reviewed it," what that trial looks like; again, with the exception that if they want to claim, which they haven't, that they didn't really thoroughly review it, that they said they spent a hundred hours and they spent two hours. But the rest of those things, if you look at them, I think it's impossible, it would be impossible to have a trial to prove or disprove those things. And, in any case, there is no claim that any specific thing is false, so what we're really saying is, "Boy, this is a pretty unfortunate situation. Something must have gone wrong. They must have known sooner than they said," and there's simply nothing in the complaint that would cause you to reasonably believe that. You have sophisticated actors on both sides. You had a six-month courtship, and during that time, there are

conversations that are described in the complaint, there are PowerPoints described in the complaint, there's other papers that are either alluded to or you can infer in the complaint. We don't know anything about any of those details. We just know the conclusions, we just know the headlines, and, your Honor, I submit that that's an impossibility for this Court to try.

And I also suggest the Court -- obviously, we extensively briefed this -- there are a couple of cases that we think are really directly on point. Judge Woodlock's decision in *NPS* is almost exactly like the allegations in this case, the claim there that there is this time-tested model of stringent underwriting practices, and the Court said, "No. That's just not specific enough to warrant a misrepresentation claim."

Your Honor, may I just make two other points on Counts 2 and 3?

THE COURT: Yes.

MR. BUCKING: We already spoke about Count 2 quickly. Both counts should be dismissed for the same reason Count 1 should be dismissed, but, in addition, there are a couple of extra points. On Count 2, if you look at the cases, your Honor, in each and every case there are special facts that justify a duty to disclose. For example, in the *First Marblehead* case, the company put out paperwork

saying employees had ten years to exercise options when they really had three months, and so the Court said, "There you have a duty to disclose because you said something that was contradictory." In the *Zipcar* case, Judge Saris said there was no duty to disclose, there was no special duty in the employment context. And there is no facts in this case that either suggest there's a special duty to disclose or that something specific was said that needed to be corrected, like in the example I gave with the seed money.

And then, finally, the tortious interference claim, your Honor, most of what we did in the brief I think focused on the question of whether, if Loomis is the one who's tortiously interfering with a contract between Mr. Bhammer and Macquarie, does Loomis's interference have to be directed toward Macquarie, or can it be directed toward Mr. Bhammer? Okay, that's mostly what we talked about in the brief. And I submit to you that we're right on that point, that if you really look at the case law, the interference is and has to be directed at the third party rather than the plaintiff.

But in this case, I think there's a more fundamental flaw, which is, the interference has to be relevant in some fashion to the third party, and here's what I mean by that: Let's say Loomis in an attempt to free up Mr. Bhammer went to Macquarie and said, "I heard that

Mr. Bhammer --" and just fill in the blank, just some horrible thing, committed a crime, did whatever, okay. So there you have a direct contact with the third party, which we say you need to have, okay. But aside from that it's with the third party, there's actually conduct that's relevant to that relationship because you're attempting to interfere with their employment, as opposed to here where everything Loomis did was directed at Mr. Bhammer.

To take the flip side of that, assuming the law allowed the interference to happen vis-a-vis Mr. Bhammer rather than vis-a-vis Macquarie, it could theoretically be something like saying to Mr. Bhammer something terrible about Macquarie: They're about to be indicted or the company is going to go bankrupt, or just some bad statement. But in each of those cases, whether Loomis is speaking to Macquarie or speaking to Mr. Bhammer, the thing that's being said is relevant to the contractual relationship between the two of them. The problem here is that everything Loomis said -- look at the complaint -- everything that Loomis said that Mr. Bhammer is complaining about had purely to do with the potential opportunity at Loomis and had nothing to do with Macquarie at all. The interference is secondary or tertiary. The interference claim is that, in essence, he had to leave Macquarie to go to Loomis and Loomis was trying to lure him, but there's no claim that there was any actual

interference or that Loomis cared one way or the other whether he was working with Macquarie. He could have been working anywhere. He could have not been working at all. He could have said, "I'm going to reenroll in school and go to Oxford, and that's what I would have done, but then you lured me to come work for you," or, "I was going to go on an African safari with my family, and you interfered by luring me to your job." The thing he was being lured away from is irrelevant, and I submit to the Court that for there to be a tortious interference claim, it has to be relevant. There has to be some manner in which Loomis is alleged to have actually interfered in that contract, as opposed to simply trying to lure him to employment. That alone is not enough.

Thank you.

THE COURT: All right, thank you. All right, Mr. Hannon.

MR. HANNON: Yes, your Honor. Let me just start on that last part regarding Count 3, the tortious interference claim; and, as we write in our briefs, we think Mr. Bucking is flat out wrong regarding whether or not the interference or tortious interference needs to be with the third party or with the person themselves. And the Mass. SJC addressed this directly in *Shafir v. Steele*. We cite that in our brief. It's 431 Mass. 365. And the SJC there adopted Section 766-A of the Restatement of Torts and made

clear that Massachusetts, along with the majority of common law jurisdictions, was going to be following this particular type of tortious interference. So with respect to Mr. Bucking's claim that the interference has to be with some third party, that's just not true.

Now, with respect to what the interference has to entail, Mr. Bucking suggests that there needs to be some kind of connection with the third party or some sort of intent, and I would submit that's fundamentally wrong as well. Note we're talking about a tort, and really the basis of the tort is the knowledge of the existence of the relationship. And when you have knowledge of the existence of a relationship, and through improper means or motive you interfere with that relationship, at the end of the day, it doesn't matter why you're interfering, it doesn't matter how you're interfering; the fact is that you have knowledge of the risk of harm to the party, and you engage in improper conduct that causes that harm, and that tort then lies, and that's exactly what happened in this case.

With respect to the misrepresentation and nondisclosure claims, just to sort of take a step back here regarding the factual record, and I think part of the factual record that Mr. Bucking didn't focus on is what we allege that Loomis knew during what he's described here as this courtship. And the complaint alleges that Loomis knew,

before this courtship even began, that Mr. Bhammer had this employment relationship in Hong Kong; that he was going to need to move his family, his young family, in order to take Loomis's proposed job opportunity. Loomis knew that before they began recruiting him. That was also something that he reinforced during this courtship period. As we allege, there was a specific conversation with Mr. Russell from Loomis in which Mr. Bhammer specifically inquired about Loomis's commitment to make sure that they were actually aware of the market they were getting involved in, that they were aware of the risks posed by the market, and that they were truly involved in this for the long haul. In short, Mr. Bhammer, he communicated to Loomis throughout that this was an issue that he was specifically focused on.

And he did this again when he accepted the offer. As we also allege, after he accepted the offer but before he resigned from his existing employment, he told Loomis, "Listen, I'm not going to give notice of resignation until you can confirm for me that we're all set." And in particular, there was an issue with respect to the approval of his background check. So Loomis knew that Mr. Bhammer had this existing relationship and that he was not going to surrender this existing relationship unless the representations they had made regarding their commitment to the fund were and remained true at the time he gave his

notice.

So to answer Mr. Bucking's question regarding what is it that we allege that Loomis misrepresented, and for all of the characterizations that Loomis made, both today and also in their papers, they really don't spend an awful lot of time talking about the actual representations that we allege. They spend a lot of time characterizing them, saying what they aren't, but they really don't spend a lot of time talking about what they are.

And in terms of what these allegations are, we've provided a chart on Page 7 of our opposition brief to walk through sort of the primary representations that we've alleged. And there's sort of a common theme in these representations, and the common theme is important for one reason, which is that the law is clear that representations are not just explicit; they're also implicit. So in considering whether or not Mr. Bhammer has alleged an actionable misrepresentation here, the Court should not focus merely upon what he alleges was represented but also what plausibly could be inferred as a representation from them. And if you look at all of the representations as a whole, there was a common theme, and the common theme here was that Loomis had done its homework, that they had looked at this fund, that they had already looked at the processes, the strategy involved, they looked at the market; they'd

done all of their homework on the fund, and they'd already made up their mind. That was their allegation to Mr. Bhammer: "We've done the homework. We've made up our mind, and we're ready and committed to doing this thing."

It's also important to recognize that they also made representations, to your Honor's point earlier about the case law regarding opinions and whether or not opinions are actionable, and, as you note, the case law is clear that when you render an opinion, you're not just saying your opinion is true, that you truly believe it; you're also in some cases representing that the facts underlying the opinion are true. And Mr. Bucking would have the Court believe that Loomis doesn't operate its business based upon facts, that Loomis simply operates its business based upon feelings and conjecture and all of that, and I would submit that common sense suggests that that's not true; that at the end of the day, regardless of what they're saying about what they've reviewed or whether or not they've been thorough, that Loomis operates its business based upon facts, based upon facts that it gathers, based upon facts that it analyzed, and has represented to Mr. Bhammer throughout this process that those facts, that the facts within Loomis's control and possession and knowledge, that those facts supported this decision to launch this fund. And I would submit that the facts alleged in the complaint plausibly

suggest that Loomis represented to Mr. Bhammer that there were no facts known to Loomis that were contrary to that decision, that Loomis at no time prior to its disclosure of abandoning the fund, that Loomis kept on representing, "Yes, we've done our homework. We're sure we're doing this. We're not aware of any facts that might cause us to decide to abandon it."

So were those representations true? And as your Honor pointed out in response to Mr. Bucking's question about, you know, where are these specific allegations as to what specific fact is true or untrue, in assessing the sufficiency of the complaint, the question is ultimately whether or not the well-pleaded factual allegations plausibly support the inferences that we need the Court to draw; and we would suggest that the facts here plausibly support the inference that each of the representations we've identified were false. D there are three things in particular, three facts in particular that we allege that we think are important. The first has to do with the timing.

Now, Mr. Bucking when he spoke a few minutes ago, he tried to paint a picture where there was a six-month gap, right? He focused on that first January conversation for a reason, because timing here matters a lot. If it's a six-month gap between the time that these representations are made and Loomis decides to shut down the fund, that's a

very different case than what we have here because the case we have here is a three-week gap. The case we have here is that Loomis is continuing to make representations to Mr. Bhammer concerning the fund, concerning the fact that everything is on track, that he's starting his employment soon. They're making all those representations all the way up through June. So we're looking at just a three-week gap from when Loomis is representing that all things are a go and Loomis suddenly announces that they're not.

And the other important fact here as well is the explanation that Loomis provides when they announce to Mr. Bhammer that they're shutting this fund. Mr. Bucking, he described this as an inherently volatile business, and I would submit the reason for that is to suggest that, you know, jeez, maybe something changed here, maybe some of the underlying facts that went into Loomis's decision here changed; but if you look at Loomis's explanation for why they decided to abandon the fund, that's not what they claimed. They didn't claim that there had been some sort of shake-up in management or something else unforeseen that caused them to suddenly change their mind. What they pointed to was really just two reasons: One, they said that they didn't have the systems, which I would submit was in direct contradiction to their prior statements regarding that they had already looked at everything and done their

homework. And the other was that they simply decided they didn't like the strategy. Loomis said nothing about any sort of volatility or changes that had happened in that three-week period that led them to abandon the fund. And I would submit that the lack of any such reasons and the reasons that were given, those are part of the circumstantial case here, your Honor, that plausibly support the inference that in fact the representations that had been made to Mr. Bhammer throughout his courtship simply weren't true.

On the question of whether or not the claims are actionable, with respect to the misrepresentation claim, I think Mr. Bucking focused a great deal on the shoe case, but there are a number of cases in Massachusetts -- we've cited several of them -- that deal with different kinds of representations, not all of which have the same factual flavor that Mr. Bucking suggests is necessary. And I would submit that the case law in Massachusetts is clear that trying to determine what is a fact versus what is an opinion really is in and of itself a factual question.

Mr. Bucking posed the question several times, what does this trial look like? And the honest answer is, we don't know. We're not there yet. The question before the Court is not what the trial in this case will look like. The question is simply, have we alleged sufficient facts to

plausibly suggest that if we engage in discovery, that we'll be able to support our claims? And we would submit that we have.

With respect to the issue about tortious nondisclosure, I believe your Honor asked the question, don't the facts plausibly suggest that Loomis knew sometime in advance of two or three weeks that they were going to shutter the fund? And we would submit that the facts do support that inference; that common sense, which the First Circuit says is part of your Honor's decision of whether or not the allegations are enough, common sense would plausibly suggest that this wasn't a decision that was made overnight. It would plausibly suggest that given the fact that this was a fund that Loomis had spent months in gearing up, a fund that Loomis had itself characterized as proceeding carefully and thoroughly, that the Loomis representatives simply did not just wake up one morning and decide, "You know, the thing we're working on for six months, let's just not do that," and that in fact that there was some significant period of time during which that was deliberated.

And I would also argue that the facts plausibly suggest that that decision was made based upon information, was made based upon facts that Loomis had, either they had at the time they were making these representations to Mr. Bhammer or that they acquired subsequent to that caused

them to in some way, you know, change their decision. What we know is that something happened, something happened between January, and we know that something happened prior to this ultimate decision to shutter the fund, and that was never disclosed to Mr. Bhammer. And for the reasons your Honor pointed out in terms of what Loomis knew about the significance of this decision, in light of all the representations that Loomis had made regarding the commitment of the firm to the fund, for all of those reasons, Loomis did have a duty.

And I would also say that in response to Mr. Bucking's question about how do you as a factual matter decide when should that disclosure take place or what rises to the level of requiring that disclosure, that's a jury question. Those are the kinds of issues that juries struggle with every day based upon the facts and circumstances and based upon the law as they're instructed. And in this instance, the law is clear that under circumstances such as this, where Loomis has made affirmative representations regarding its commitment, regarding the thoroughness of its decision-making, where Mr. Bhammer has specifically inquired regarding their commitment to make sure that in fact there were no contrary facts out there, then in those circumstances, they have the duty; and the question for a jury in this case ultimately will be, did

Loomis fulfill that duty? And, again, for the reasons stated and everything in our papers, we would submit that the facts alleged here do plausibly support the inferences that we need in order to get over the 12(b)(6) hurdle, and we would ask that the Court deny the motion to dismiss.

THE COURT: This is obviously beyond the pleadings, but why is there no either breach of contract claim or a breach of quasi contract, detrimental reliance, promissory estoppel?

MR. HANNON: Not the remedy we're looking for. We're not looking to enforce the terms of the employment agreement with Loomis. And in fact his prior employment arrangement was actually more lucrative on at least sort of a baseline, so for that reason, we're not seeking to enforce that agreement.

THE COURT: All right, so it's strictly tort claims?

MR. HANNON: That's correct, your Honor.

THE COURT: All right, any quick response?

MR. BUCKING: Your Honor, yes, just very briefly. I appreciate Mr. Hannon's honesty in response to that question, which is that what Mr. Bhammer negotiated for, when he knew he was getting into an unlaunched hedge fund in Asia, wasn't good enough, and so he's asserting tort claims, when he had the capacity and the professional ability and

the experience to negotiate for how he should be treated in precisely this situation. I think that speaks volumes about this complaint.

THE COURT: Well, it's all outside the pleadings. It just struck me reading this that if there wasn't a contract, you know, why isn't there a promissory estoppel claim? But --

MR. BUCKING: Right, your Honor. It goes to context, which the cases all instruct is something that we need to look at in assessing the circumstances here, and we're dealing with an inherently volatile situation. I come back to the innovation economy that Massachusetts lives or dies on, and this notion that --

THE COURT: Or Singapore, as the case may be.

MR. BUCKING: -- this notion that somehow Loomis owed Mr. Bhammer a minute-by-minute or perhaps second-by-second update on any fact or any thought that anybody in the company might have had that called into question whether the fund was going to launch simply can't be the case. There's no case law anywhere that suggests that that's the law. I think that's the crux of this. And what this comes down to is, Mr. Hannon says, "Well, it's not January to July. It's really three weeks." You know, maybe it's from that second PowerPoint that he got in June until July when, you know, as time goes on, there's no question

that there are a series of conversations, as alleged in the complaint, that essentially confirm that, "Yeah, we've looked at it again, and things still seem to be on track."

And what the complaint stands for is that things were on track until they weren't on track, right? That has to by definition be the case. There's no claim that anyone was deliberately lying in January and February and March and April, at least no specific claim. Mr. Hannon says, well, there's no -- Loomis didn't say, or at least the allegations that he puts in the complaint don't say, that anything had changed; but the inherent nature of the enterprise was volatile where until it launched, of course it's a question of whether it launches, just like every start-up business anywhere who's seeking investors or seeking employees, until it happens, and even after it happens, it can go bust. That's the nature of the enterprise.

And, again, this notion that either that there's an allegation that says, "We knew on June 10 but we didn't tell him until July 16," there is no such thing, we're just guessing. And what it reduces to is, well, you couldn't have begun thinking about it the second you decided. I suppose that's true, right? I mean, I suppose, even if there was a half-hour meeting, you might have been talking about it at the beginning of the meeting and didn't tell him till the -- you know, and then as soon as the meeting

ends, we run and we call him and say it's over. But then the claim would be, well, you should have told him the second the meeting started. The same holds true in this if you take it to a week or a day. The second anybody has the slightest factual input, the second anyone has the slightest doubt that maybe it's not as good in July as it was in June, or not as good in June as it was in May, that somehow there's a duty to run to Mr. Bhammer and say, "Hold on. One of the people involved in the discussions is questioning this month's numbers, and, you know, you'd better not move forward." There's nothing in any case that suggests that that supports a misrepresentation claim.

Thank you, your Honor.

MR. HANNON: Your Honor, if I could briefly respond to that?

THE COURT: Yes.

MR. HANNON: There's nothing in any case to suggest that doesn't support a misrepresentation claim, and, as I mentioned a moment ago, I think the ultimate question that Mr. Bucking is asking is, you know, where do we draw the line between when the duty of disclosure arises? And that is a factual question, and the only question for this Court in assessing the sufficiency of the complaint is, have we plausibly suggested that that duty of disclosure arose at a point in time where it caused Mr. Bhammer harm? And again

we suggest that the facts here do plausibly suggest that the duty of disclosure arose sometime before the middle of June. It arose at a point in time where Mr. Bhammer had the ability to tell his former employer, "Hang on. I'm going to keep this job." And that's enough to get over a motion to dismiss. It might not get us to a trial at this point, Judge, but that's not what we're asking for. We're just asking to get past the 12(b)(6) stage.

And then there's one last thing I would say is that just for the record, to the extent your Honor does discern any deficiencies in our complaint, we would ask for leave to amend to correct whatever the deficiencies, if any, your Honor discerns.

THE COURT: Well, on that latter point, you know, the way this works is, you can seek to amend your complaint in response to a 12(b)(6) motion, but it really isn't supposed to work. You wait until I rule, and then if I rule against you, you get to amend your complaint. It's, you know -- anyway, it's not the way it's supposed to work, but we'll cross that bridge when we get to it.

All right, I'm going to take this under advisement. Thank you. It was well argued on both sides. And, Mr. Hannon, don't forget my jurisdictional issue, and thank you.

MR. HANNON: Thank you.

THE CLERK: All rise.

(Adjourned, 2:54 p.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT )
DISTRICT OF MASSACHUSETTS ) ss.
CITY OF BOSTON )

I, Lee A. Marzilli, Official Federal Court Reporter, do hereby certify that the foregoing transcript, Pages 1 through 38 inclusive, was recorded by me stenographically at the time and place aforesaid in Civil Action No. 15-14213-FDS, Vishal Bhammer v. Loomis, Sales & Company, L.P., and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

Dated this 27th day of June, 2016.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER